

EXHIBIT “X”

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 -----X

4 JUAN VARGAS, on behalf of himself
5 and all other similarly situated,

Plaintiff,

CV #

15-cv-5101 (GHW)

-against-

7 CHARLES W. HOWARD and CALL-A-HEAD

8 CORP.,

9 Defendant.

10 -----X

11
12 445 Broadhollow Road
13 Melville, New York

December 19, 2016

14 9:52 A.M.

15
16 EXAMINATION BEFORE TRIAL OF CHARLES W.
17 HOWARD, one of the Defendants herein, taken by the
18 Plaintiff, pursuant to Federal Rules of Civil
19 Procedure, and Order, held at the above-mentioned
20 time and place before Courtney Biondo, a Notary
21 Public of the State of New York.

1 Charles W. Howard

2 look at the location, and we compare it to our
3 route. Okay. We compare it to the route.

4 Now, if there is -- let's say there is a
5 time for an hour, we go to the route. What stop is
6 there? Oh, there is a toilet there, one toilet. We
7 go to the next one. Oh, he is here forty-eight
8 minutes. We go to the route. Oh, there is no
9 toilets there. Then we go to the next one. Oh, it
10 is his house. Then we go to the next one.

11 So what we do is we prove to ourselves
12 and to the driver what was wrong and we reprimand
13 him, most times write him up. There are write-ups
14 on it, all depending how busy we are or how crazy it
15 is. And that's it.

16 Q Will they get paid overtime in those
17 instances?

18 A They are written up for theft of service,
19 for robbing us. They are robbing the company.

20 Q If someone returns late, they are
21 generally robbing the company --

22 A If we prove --

23 Q -- if they don't have an additional stop?

24 A If we prove it on the GPS.

25 Q What if you don't prove it on the GPS?

1 Charles W. Howard

2 A It is impossible. It has never happened.

3 Q Because of the route?

4 A They have a set route with a set time,
5 and if they are out late, every time we go to the
6 GPS. They are robbing the company, theft of
7 service, stealing our time. And that's all
8 documented.

9 So let's say you give me one driver, any
10 driver you want, doesn't matter which one, I will do
11 all of the research and show you how it works.

12 Q Do you know what a Wage Theft Prevention
13 Act Notice is? I'm sorry. Do you know what a Wage
14 Theft Prevention Act Notification of Pay Rate is?

15 A A Wage Theft -- say it one more time.

16 Q Sure. I'm going to hand you a document
17 that might help you.

18 MR. GRAFF: You want to mark it as an
19 exhibit?

20 MR. MARLBOROUGH: Yes. I'm going to
21 mark this as -- we will call it C. Howard 1,
22 Plaintiffs' C. Howard 1.

23 This is an exhibit she is going to beg
24 marking for you and she will give you a copy
25 to look at, and then we are going to talk

1 Charles W. Howard

2 A It was calculated over the rate.

3 Q And any other documents where I show you
4 people working more than fifty hours a week --

5 A Just keep in mind --

6 MR. GRAFF: Wait. Let him ask the
7 question.

8 THE WITNESS: Sorry. Sorry.

9 Q If I were to show you many, many more of
10 these documents showing that workers worked more
11 than fifty hours a week, would your position be that
12 they must have been paid overtime for that?

13 A Or -- okay. So this is a great example.
14 These are thieves, and he is out there with the
15 truck for three or four or five hours a day sitting
16 and not doing the job, using the truck for personal
17 business.

18 Q Spending substantially more than ten
19 hours a week --

20 A More.

21 Q -- doing his personal business --

22 A More than that.

23 Q -- when he is not getting paid for the
24 ten hours?

25 A Way more. Twenty or thirty hours.

1 Charles W. Howard

2 Q Twenty or thirty hours of unpaid hours?

3 A No. I am saying twenty or thirty hours,
4 according to the GPS.

5 Q But you only paid him for the first
6 forty?

7 A You are missing the point. On the GPS,
8 it shows twenty hours of him not working, at
9 locations where there's no toilets. And he was paid
10 for the overtime, too. So you got that, too. I was
11 just using him as a great example of somebody
12 sitting in the truck and not working.

13 (Whereupon, a discussion was held off
14 the record.)

15 Q Given your position, I don't need to show
16 you all of those fifty documents of people working
17 fifty hours a week, because your answer will be the
18 same; is that right?

19 A Of course.

20 MR. MARLBOROUGH: Next. What are we up
21 to, Y?

22 (Whereupon, a discussion was held off
23 the record.)

24 (A printout from CareerBuilder was
25 received and marked Plaintiffs' Exhibit

1 Charles W. Howard

2 it more. I would say it balances out. It is pretty
3 much a balancing act because somebody doesn't do it
4 every week. I don't think anybody does.

5 Q And some of them do very few Fridays?

6 A There is a couple that try to avoid
7 Fridays, but we tell them that, you know, we need
8 you to work Fridays. We try to get them to do it.
9 We try to encourage them.

10 Q Do water truck drivers also work on
11 Fridays?

12 A No.

13 Q How about the flat bed drivers?

14 A They do.

15 Q So there is some flexibility with working
16 on Fridays; is that correct?

17 A There is choice. They have a choice.

18 Q A choice. Except for the water truck
19 drivers, because there is no --

20 A They don't have to work Fridays, yeah.

21 Q Are workers -- what is the time keeping
22 system that you use?

23 A Well, they punch in and they punch out.

24 Q What kind of a device do they punch in
25 and punch out on?

1 Charles W. Howard

2 Some walk right out and some have to wait, depending
3 how severe the problem is, if they got in an
4 accident, they lost an account, you know, something
5 like that. They didn't dump correctly at the dump
6 and they got a ticket. There is a hundred reasons
7 that could be a major problem. If a customer calls
8 up, he hit their fence. It just goes on and on.

9 Q Were workers ever instructed not to punch
10 out?

11 A The only time we don't have them punch
12 out is on Friday because they get a separate check,
13 and the checks are time and a half, and it is not in
14 the same system as the other check. So if they
15 punch out, it ties into the other check system. So
16 it has to be separate.

17 Q How about Monday through Thursday? Were
18 workers ever told not to punch out?

19 A Only on Friday because, like I said, they
20 get -- the reason we do a separate check is because
21 we give it to them the day of the work and it is
22 time and a half. So it promotes them to work the
23 fifth day.

24 Q Why does it have to be by separate check?

25 A Because the other checks are already

1 Charles W. Howard

2 lunch. They are out there ten hours, so --

3 Q How about the punching in and punching
4 out system?

5 A At one point, it went from a card to
6 fingerprint. I can't say when that date was. But
7 we probably had a system in place for twenty years,
8 fifteen to twenty years.

9 Q What about the not punching in on Friday
10 system?

11 A It has always been there because it has
12 always been a separate check, and the key is -- it
13 doesn't matter if it is a separate check. They
14 could use the system. But the thing is, it is the
15 separate check the day of. That's where the problem
16 comes in.

17 In other words, that check is prepared in
18 advance to give them when they walk in the door that
19 day, which, I might add, I am very proud of, and it
20 is a great system, unique, and I don't think anybody
21 else does it that I ever heard of, that you get a
22 check that day that you worked for that day. Help
23 the company, promote work on Fridays.

24 Q Did you issue wage statements to workers?
25 I will call it a pay stub. We will say the pay stub

1 Charles W. Howard

2 the Bronx.

3 (Pause in the proceedings.)

4 A Go ahead.

5 Q Do you recall whether or not this case is
6 still ongoing?

7 A I don't know.

8 Q Did assign this person to a undesirable
9 route in retaliation for his --

10 A All routes are undesirable. They are
11 scrubbing toilet seats with a brush.

12 Q A less desirable route?

13 A They are undesirable. I can't measure.

14 Q Did you do that to Mr. Vargas?

15 A Absolutely not.

16 Q Did you ask Mr. Vargas --

17 A If you have a route, the route becomes
18 almost like your home. You get to know it. You
19 know where to get your coffee. You know where to be
20 and what time to be there. You get good at it.
21 Okay. So the route location is irrelevant. We have
22 fifty routes spread out all over.

23 Q But just transferring a person, because
24 they are into a new route --

25 A No, people have --

1 Charles W. Howard

2 the fact that they signed off on it, to me, it is
3 irrelevant.

4 Q So whether or not they took the lunch, is
5 that irrelevant to you?

6 A It is irrelevant that I would not believe
7 that they didn't take lunch because they signed off
8 they did. So there is no way I would believe they
9 did not.

10 Q Were they allowed to not sign off on
11 taking a lunch?

12 A They have to take the lunch.

13 Q They have to take a lunch?

14 A They have to take a lunch. What would be
15 the alternative, letting them come back a half hour
16 earlier? I already let them come back one hour
17 early. I let them come back at 1:30.

18 Q The GPS data would indicate if someone is
19 taking a thirty-minute period of time right outside
20 of their truck?

21 A The GPS shows everything. It will tell
22 you where they ate lunch.

23 Q Are you aware that we have made requests
24 for the GPS data?

25 A Through my attorney?

1 Charles W. Howard

2 A A hundred or zero.

3 Q Either you get -- right. And how are
4 those bonuses paid?

5 A A check, mid week, around Tuesday or
6 Wednesday.

7 Q Now, was that included or indicated on
8 the pay stubs?

9 A No.

10 Q Was it indicated on the W-2s that they
11 would get at the end of the year?

12 A I would have to check. I believe it is,
13 yes.

14 Q What about the cash payments? Were those
15 indicated on the W-2s at the end of the year?

16 A I would have to check that. I don't
17 think it is, but that I would have to check to be
18 sure.

19 Q What about the overtime payments?

20 A The Friday payments?

21 Q Yes.

22 A When they work overtime on Friday?

23 Q Yes.

24 A What was the question?

25 Q That would be -- would that be indicated

1 Charles W. Howard

2 Q You said he is owed all wages that were
3 paid to him? Did you say that he is -- you are owed
4 all wages that were paid to Mr. Vargas?

5 A Yes.

6 Q Did Mr. Vargas ever do any productive
7 work for you in the six years?

8 A No. He never cleaned them right, and he
9 tried once or twice, and that was it. Basically, he
10 would steal the time.

11 Q And you let him get away with that for
12 six years?

13 A Well, the thing is always coaching, you
14 know, trying to get them operating right because it
15 is a difficult job. We understand that. But in his
16 case, it shows him blatantly robbing the time.

17 Q Have you sued any of your other employees
18 for robbing time --

19 A Well, the thing --

20 Q -- other than the plaintiffs in this
21 lawsuit?

22 A No. And the reason was is because this
23 is the case where I have had it, and I want to fight
24 back to the end. Okay. And now the drivers have
25 to, you know, pay.

1 Charles W. Howard

2 girls his route, you know, tell them how many were
3 locked or he missed, and they will ask if he needs
4 any supplies, and that's it. Then he leaves.

5 Q How long is he in the office between when
6 he would finish driving and leaving for the day?

7 A Good drivers, five minutes. Drivers that
8 are not doing too good, it might be fifteen minutes.

9 Q Why would a driver who is not doing good
10 take longer than a good driver?

11 A He is getting too many complaints from
12 the customers. He is just, you know, not cleaning
13 them correctly.

14 Q And the dispatchers would address these
15 issues?

16 A Exactly.

17 Q Would workers be required to wait for you
18 to sometimes address those issues?

19 A Depends on how severe. You know, like if
20 we lost an account, he would have to wait for me to
21 talk to him.

22 Q On a regular basis, would workers have to
23 wait in line for you to address the issues, to be
24 dismissed for the day?

25 A It depends on how severe. Some, no.

1 Charles W. Howard

2 that distribute the work?

3 A Correct.

4 Q How many dispatchers do you have at any
5 one time?

6 A Maybe twelve, ten to twelve.

7 Q You have some internal office personnel?

8 A Well, dispatchers handle all of the
9 drivers. Korynn is the office manager, and that's
10 basically what handles all of the operations, the
11 routing, the problems, complaints from the
12 customers.

13 Q Is Kathleen Diagnault, is that an
14 employee?

15 A Yes.

16 Q Who is she?

17 A She was dispatch -- she is dispatch
18 manager.

19 Q I have seen some documents that have
20 indicated that you stated that you had a hundred
21 forty-three employees at any one time.

22 A That could be. That's about correct.

23 Q Is there some group of employees that I
24 am missing, if I look at fifty-five --

25 A No.

1 Charles W. Howard

2 Q -- pump truck drivers, four water truck
3 drivers, eleven flat bed and -- how many
4 dispatchers?

5 A About ten to twelve.

6 Q Does that pretty much cover the gamut of
7 workers?

8 A No.

9 Q Okay. So what other type of worker?

10 A There is, you know, people in the yard
11 preparing the equipment, loading it.

12 Q Okay. does Kenny work in the yard?

13 A Correct. He is in charge of operations.

14 Q And how many people do you have in the
15 yard underneath Kenny?

16 A Maybe thirty.

17 Q Okay.

18 A I can't say for sure. I'm guessing. But
19 overall, it is about a hundred forty-five to a
20 hundred fifty employees.

21 Q And there is some sales?

22 A Some sales girls, yes, about ten of them.

23 Q Does that pretty much cover the classes
24 of employees?

25 A I would think.

1 Charles W. Howard

2 Plaintiffs' Exhibit C. Howard E for
3 identification at this time.)

4 THE WITNESS: Thank you, ma'am.

5 Q This is a document entitled "Second
6 Amended Complaint and Jury Demand." It is dated
7 January 19, 2009, and it is brought by plaintiff
8 Moises Maloof, individually and on behalf of all
9 other persons similarly situated, against
10 Call-A-Head and Charles W. Howard.

11 Have you seen this document before?

12 A It looks familiar.

13 Q Do you know who Moises Maloof is?

14 A I don't remember who he is, no.

15 Q Do you know an employee named Richard
16 Gomez?

17 A I go through thousands. You know, they
18 are scrubbing a toilet bowl with a brush. I can't
19 remember them.

20 Q Did they all bring federal lawsuits
21 against you?

22 A Say that again?

23 Q Did they all bring federal lawsuits
24 against you?

25 A Well, I have thousands -- that's being

1 Charles W. Howard

2 rude, but I have thousands of people that try for
3 that job, and it is not for everybody. All right.

4 Q Are you aware of Richard Gomez being one
5 of the people who brought a federal lawsuit against
6 you?

7 A I can't remember Richard. I can maybe
8 remember the document, but I can't remember -- put
9 the face to the name.

10 Q I believe Richard Gomez is not referenced
11 in this document, but I am just asking you if you --

12 A The name sounds familiar, but I can't
13 remember him or not.

14 Q This document alleges to be a class
15 action against you for overtime payment.

16 A Okay.

17 Q There is no indication in the document
18 that a class was certified. Do you know if a class
19 was certified in this case?

20 A I do not know.

21 Q Do you know who Justin Zeller is?

22 A No.

23 Q He is listed as the lawyer in this case.
24 His name doesn't ring a bell?

25 A No.

1 Charles W. Howard

2 Q Did you ever have a federal lawsuit in
3 which -- against you in which fifty-nine plaintiffs
4 joined the case?

5 A I had a lawsuit. I guess that could be
6 it.

7 MR. MARLBOROUGH: All right.

8 (A letter from the Scher Law Firm, dated
9 March 16, 2009, was received and marked
10 Plaintiffs' Exhibit C. Howard F for
11 identification at this time.)

12 THE WITNESS: Thank you.

13 MR. MARLBOROUGH: I have just handed the
14 witness what appears to be a letter from the
15 Scher Law Firm, dated March 19, 2009.

16 MR. GRAFF: March 16th.

17 MR. MARLBOROUGH: I apologize. March
18 16th, 2009. And in footnote two, it makes
19 reference to a lawsuit with Mr. Gomez.

20 Q Does that refresh your recollection as to
21 whether or not there was a lawsuit brought against
22 you by Mr. Gomez, Gomez v. Call-A-Head?

23 A I can't remember Mr. Gomez, and a lot of
24 this stuff is handled by the firm, and you know, I
25 am so busy trying to run the company.

1 Charles W. Howard

2 lunch. They are out there ten hours, so --

3 Q How about the punching in and punching
4 out system?

5 A At one point, it went from a card to
6 fingerprint. I can't say when that date was. But
7 we probably had a system in place for twenty years,
8 fifteen to twenty years.

9 Q What about the not punching in on Friday
10 system?

11 A It has always been there because it has
12 always been a separate check, and the key is -- it
13 doesn't matter if it is a separate check. They
14 could use the system. But the thing is, it is the
15 separate check the day of. That's where the problem
16 comes in.

17 In other words, that check is prepared in
18 advance to give them when they walk in the door that
19 day, which, I might add, I am very proud of, and it
20 is a great system, unique, and I don't think anybody
21 else does it that I ever heard of, that you get a
22 check that day that you worked for that day. Help
23 the company, promote work on Fridays.

24 Q Did you issue wage statements to workers?
25 I will call it a pay stub. We will say the pay stub

1 Charles W. Howard

2 look at the location, and we compare it to our
3 route. Okay. We compare it to the route.

4 Now, if there is -- let's say there is a
5 time for an hour, we go to the route. What stop is
6 there? Oh, there is a toilet there, one toilet. We
7 go to the next one. Oh, he is here forty-eight
8 minutes. We go to the route. Oh, there is no
9 toilets there. Then we go to the next one. Oh, it
10 is his house. Then we go to the next one.

11 So what we do is we prove to ourselves
12 and to the driver what was wrong and we reprimand
13 him, most times write him up. There are write-ups
14 on it, all depending how busy we are or how crazy it
15 is. And that's it.

16 Q Will they get paid overtime in those
17 instances?

18 A They are written up for theft of service,
19 for robbing us. They are robbing the company.

20 Q If someone returns late, they are
21 generally robbing the company --

22 A If we prove --

23 Q -- if they don't have an additional stop?

24 A If we prove it on the GPS.

25 Q What if you don't prove it on the GPS?

1 Charles W. Howard

2 A It is impossible. It has never happened.

3 Q Because of the route?

4 A They have a set route with a set time,
5 and if they are out late, every time we go to the
6 GPS. They are robbing the company, theft of
7 service, stealing our time. And that's all
8 documented.

9 So let's say you give me one driver, any
10 driver you want, doesn't matter which one, I will do
11 all of the research and show you how it works.

12 Q Do you know what a Wage Theft Prevention
13 Act Notice is? I'm sorry. Do you know what a Wage
14 Theft Prevention Act Notification of Pay Rate is?

15 A A Wage Theft -- say it one more time.

16 Q Sure. I'm going to hand you a document
17 that might help you.

18 MR. GRAFF: You want to mark it as an
19 exhibit?

20 MR. MARLBOROUGH: Yes. I'm going to
21 mark this as -- we will call it C. Howard 1,
22 Plaintiffs' C. Howard 1.

23 This is an exhibit she is going to beg
24 marking for you and she will give you a copy
25 to look at, and then we are going to talk

1 Charles W. Howard

2 comes in late like that, we go right to the GPS
3 immediately. And then we -- that's how we do it,
4 just so you know. The girl takes the GPS and the
5 route, and every high time over fifteen minutes, she
6 tracks it on the route, and then she writes notes on
7 it.

8 One toilet there, he was there for an
9 hour and a half. Another stop, he was there for an
10 hour, and there was no toilets. Another stop, he
11 was there for an hour, and there was another two
12 toilets there, which takes eight minutes to clean.
13 The second they come in, compare it right to the
14 GPS. And basically, it is a guy with theft of
15 service, just robbing us.

16 Q Are you paying those guys overtime?

17 A Depends on the situation. Every
18 situation is different. Some guy will come in at
19 6:00, and they will do four or five extra stops, and
20 we will throw him a hundred bucks.

21 Q This is the guy who took too long on his
22 route?

23 A No, it is not. It is a guy that was
24 given extra stops. See, there is a lot you don't
25 know and you are going to learn.

1 Charles W. Howard

2 I have been doing this since I'm twelve, forty
3 years.

4 Q Workers were paid at an overtime rate,
5 one and a half times their regular hourly rate, on
6 Fridays for the first ten hours of work; is that
7 right?

8 A Not right. It is for ten or less hours
9 of work. They were given time and a half for ten,
10 even though they worked less.

11 Friday, the routes are shrunk. They all
12 come in on time. Friday is just a complaint day,
13 where, you know, we go out and do all of the
14 complaints that came in during the week that we
15 didn't tend to.

16 Q Are you aware that workers have testified
17 that they regularly worked six days, more than ten
18 hours a day on Fridays?

19 A I'm sure they didn't. I didn't really
20 read all of the paperwork on the case.

21 Q Is that true?

22 A Is what true?

23 Q That workers were required to work
24 substantially more hours than ten hours a day on
25 Friday?

1 Charles W. Howard

2 A Not true.

3 Q But you don't have any time records to
4 show whether or not that is true?

5 A We have GPS.

6 MR. MARLBOROUGH: I think we have been
7 going for a little while. How long have we
8 been on the record?

9 THE VIDEOGRAPHER: Hour and twenty-one.

10 MR. GRAFF: And how long is a tape?

11 THE VIDEOGRAPHER: Two.

12 MR. MARLBOROUGH: Okay. Do you want to
13 take a little break?

14 THE WITNESS: It is up to you.

15 MR. MARLBOROUGH: Ten minutes?

16 THE VIDEOGRAPHER: The time is
17 11:14 a.m. We are off the record.

18 (Whereupon, a short recess was taken at
19 this time.)

20 THE VIDEOGRAPHER: The time is 11:24.

21 We are on the record.

22 BY MR. MARLBOROUGH:

23 Q Okay. Mr. Howard, we are back.

24 I wanted to ask you about bonus payments.
25 Were workers paid a bonus if they had no customer